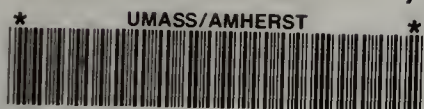


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COMMONWEALTH OF MASSACHUSETTS

OFFICE OF CONSUMER AFFAIRS
AND BUSINESS REGULATION

DIVISION OF INSURANCE

GOVERNMENT DOCUMENTS
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Docket No. F 2001-01B

IN THE MATTER OF THE PROPOSED MERGER OF

BERKSHIRE LIFE INSURANCE COMPANY

AND

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

MEMORANDUM OF DECISION AND ORDER

I. INTRODUCTION

Berkshire Life Insurance Company, a Massachusetts domiciled mutual life insurance company ("Berkshire"), seeks to merge with and into The Guardian Life Insurance Company of America, a New York domiciled life insurance company ("Guardian").

By the terms of the companies' Amended and Restated Agreement and Plan of Merger, dated as of August 31, 2000 (the "merger agreement"), Berkshire proposes to

merge into Guardian, and Guardian would continue its corporate existence and remain domiciled in and subject to the laws of the State of New York, with its principal offices in New York, New York.

Pursuant to Massachusetts General Laws ("M.G.L.") chapter 175, §19B ("Section 19B"), the proposed merger ("merger") and the merger agreement must be approved by the Commissioner of Insurance for the Commonwealth of Massachusetts (the "Commissioner"), who has broad discretion in granting such approval. M.G.L. c. 175, § 19B.¹ Pursuant to Section 19B, the merger must be:²

- (1) "evidenced by a written agreement assented to by a vote of a majority of the board of directors of each domestic company;" and
- (2) "approved by the votes of at least two thirds of such policyholders as are present and voting at a special meeting"³

Berkshire has applied for and seeks such approval.

The Commissioner's review of the merger and merger agreement under Section 19B is governed by 211 Code of Massachusetts Regulations ("CMR") § 140.00, et seq. (the "merger regulation"), pursuant to which the Commissioner may consider the following factors in deciding whether to approve the merger:

1. the fairness of the terms and conditions of the merger agreement;

¹ Section 19B applies to a merger by a domestic insurer with and into a foreign insurer, where the foreign insurer is the surviving company. M.G.L. c. 175, § 19B.

² The statute also sets forth that the merger shall not be made "until a copy [of the agreement] . . . and such other information as the commissioner may require, has been filed with [the commissioner] . . . nor until it has received from the commissioner a written authorization, in such form as he may prescribe, authorizing [the domestic company] . . . to merge or consolidate and to execute such agreement. The commissioner may, in his discretion, refuse to issue such an authorization in any case, and his decision shall be final." M.G.L. chapter 175, section 19B.

³ The statute also references that the plan must be "approved by a vote of the stockholders of such [domestic] company owning at least two thirds of the outstanding capital stock of such [domestic] company" However, this provision has no application in the instant case since Berkshire has no stockholders.

2. whether the interests of Berkshire policyholders are protected; and
3. whether the merger is in the public interest.

The merger regulation also provides the Commissioner, or presiding officers appointed by the Commissioner, with the discretion to conduct a public hearing "in order to afford interested persons an opportunity to present data, views, arguments, or comments in regard to the proposed merger . . . including, but not limited to, the [Merger] Agreement," 211 CMR § 140.08 (the "public hearing"). Such public hearing was held on June 1, 2001 in Pittsfield, Massachusetts.

The merger agreement may be approved if "subsequent to the special meeting of policyholders, it appears that the requirements of M.G.L. c. 175, § 19B, 211 CMR 140.00 and other applicable laws, if any, have been satisfied," 211 CMR § 140.14.

In addition, before the merger can take effect, New York law requires the approval of the Guardian Board of Directors and its policyholders as well as the approval of the Commonwealth of Massachusetts Division of Insurance (the "Division"). A number of other jurisdictions have laws that may affect the merger or the operations of the surviving company. The approval of those jurisdictions, where required, is also a condition precedent to the consummation of the merger, and Berkshire and Guardian have agreed to use their respective best efforts to file any required notices or otherwise take such actions as are necessary to obtain required approvals and to comply with applicable requirements in connection with the merger under such laws.

II. PROCEDURAL BACKGROUND

Promptly after its adoption on August 31, 2000, Berkshire submitted to the Division for approval, a duly executed and attested copy of the merger agreement, which had been unanimously approved by the two companies' respective boards of directors.

In connection with Berkshire's application, the Commissioner promptly designated an interdepartmental working group (the "working group") to conduct an examination of Berkshire under M.G.L. chapter 175, § 4 and 211 CMR § 140.06, including a review of the merger agreement and to advise the Division with respect thereto. The Division thereafter engaged the services of the following outside and independent legal, actuarial/accounting and financial advisors to assist in the conduct of the examination: Stroock & Stroock & Lavan LLP, as legal advisors; Tillinghast Towers Perrin, as actuarial/accounting advisors; Dresdner Kleinwort Wasserstein, Inc., as financial advisors and KPMG LLP to evaluate Berkshire's compliance with mailing policyholder information.

By letter dated September 7, 2000, the Commissioner recused herself from any participation in the process of approving or disapproving the merger and duly appointed Michael T. Caljouw and Richard A. Cody as her designated presiding officers. On April 3, 2001, pursuant to section 140.09(1)-(2) of the merger regulation, the presiding officers issued a written notice of public hearing to Berkshire and directed that it be distributed to Berkshire's directors, officers, employees and policyholders, and to Guardian, no later than 30 days prior to the public hearing.

Commencing on April 9, 2001, Berkshire sent, via first-class mail, the notice of public hearing, the proxy statement, the notice of special meeting and certain explanatory

materials to the Berkshire voting policyholders, as required by M.G.L. c. 175 § 19B and 211 CMR 140.09. In addition, that same day, Berkshire also sent, via first class mail, the notice of public hearing to all members of its board of directors, as well as to Guardian, and, at the request of the Division, notified all employees and officers of Berkshire of the public hearing by posting the notice of public hearing on Berkshire's website, by email and on employee bulletin boards. See Affidavit of Gina Cinelli Birchall.

The merger regulation provides that the notice of public hearing must also be published in a newspaper, as approved by the Commissioner, at least 30 days prior to the public hearing. 211 CMR § 140.09(5). Similarly, the notice of special meeting must be provided in accordance with the applicable laws and published at least once a week for three successive weeks in some newspaper printed in the Commonwealth of Massachusetts (the "Commonwealth"). Since Guardian is outside of the Commonwealth, the notice of special meeting must also be published at least once a week for three successive weeks in a newspaper printed in the towns where Guardian has its principal offices. M.G.L. c. 175, § 19B; 211 CMR § 140.13(2). As approved, Berkshire arranged for publication of the notice of public hearing in The Berkshire Eagle, The Boston Globe, The Worcester Telegram and The Springfield Union News on April 24, 2001 and in the New York Times on April 25, 2001. See Affidavit of Gina Cinelli Birchall. The notice of special meeting was duly published in The Berkshire Eagle, The Boston Globe, The Worcester Telegram and The Springfield Union News on April 24, May 1, and May 8, 2001 and in The New York Times on April 25, May 2, and May 9, 2001. See Affidavit of Gina Cinelli Birchall.

On or about April 27, 2001, pursuant to 211 CMR § 140.10, Berkshire requested the opportunity to testify at the public hearing regarding the merger and submitted a pre-hearing filing in support of the merger agreement, which included, among other things, the written statements and related supporting documents to be offered by Berkshire at the public hearing.

The public hearing was held on June 1, 2001 in Pittsfield, Massachusetts. The public hearing was officially recorded by a court reporter approved by the undersigned, the record was transcribed and copies of the transcript of the public hearing have been placed in the docket of this transaction.⁴ During the public hearing, Berkshire presented oral statements, under oath, of six witnesses in support of the merger agreement. These included:

- (1) David L. Kalib, Vice President, General Counsel and Secretary of Berkshire ("Kalib"), reviewed the structure of the merger and merger agreement, and discussed the proxy statement sent to Berkshire policyholders;
- (2) James W. Zilinski, President and Chief Executive Officer of Berkshire, provided background concerning the business of Berkshire, gave an overview of the strategic rationale for the merger and discussed Berkshire's structure, management, and issues relating to Berkshire's career agency sales force post-merger;

⁴ References contained herein to the official transcript of the public hearing are in the following form: "Tr. at ____."

- (3) Howell M. Palmer, Senior Vice President and Chief Financial Officer of Berkshire, reviewed the financial goals and objectives of Berkshire entering into the merger, the pro forma financial profile of Guardian and Berkshire combined, the allocation of assets in Berkshire's and Guardian's investment portfolios, and certain policyholder considerations concerning the merger, including those relating to dividends, and any future plans relative to demutualize;
- (4) Joseph D. Sargent, President and Chief Executive Officer of Guardian ("Sargent"), provided a brief outline of the Guardian, reviewing Guardian's key financial results, explaining Guardian's future plans, providing an overview regarding the strategic rationale for the merger and approval of the merger by Guardian's board of directors and the structure of the merger and post-merger activities from Guardian's perspective;
- (5) Jonathan Plutzik, Vice-Chairman of Credit Suisse First Boston Corporation ("CSFB") and Co-Chairman of that firm's global insurance practice, offered testimony concerning CSFB's opinion regarding the fairness to Berkshire's policyholders, taken as a group, from a financial point of view, of the exchange by operation of law of membership interests in Berkshire for membership interests in Guardian in the merger; and

(6) Daniel J. McCarthy, Consulting Actuary of Milliman USA

(“Milliman”), formerly Milliman & Robertson, Inc., presented testimony relative to Milliman’s opinion regarding the fairness of the merger to Berkshire’s policyholders from an actuarial point of view.

See Tr. ibid. Further commentary was provided by John Peluso, General Counsel of Guardian, and Jonathan W. Miller and Jeffrey Liebmann of the law firm of Dewey Ballantine on behalf of Berkshire on assorted legal matters.

In accordance with the duly issued notice of public hearing, the undersigned hearing officers, Michael T. Caljouw and Richard A. Cody, sought to elicit testimony from interested persons and specifically afforded an opportunity to present data, views, arguments, or comments in regard to the merger or the merger agreement. No one, other than representatives of Berkshire and Guardian, presented any such testimony at the June 1, 2001 public hearing.

On June 22, 2001, a special meeting was held by Berkshire for the purpose of allowing Berkshire’s policyholders to vote on the merger agreement.⁵ As required by 211 CMR 140.13, over two-thirds of the Berkshire policyholders who were present and voting (either in person or by proxy) at the special meeting cast votes in favor of the merger and approving the merger agreement. See Kalib Certificate dated June 22, 2001. In fact, the total vote is as follows:

| | |
|-------------------------------|-----------|
| For the merger agreement: | 168, 191; |
| Against the merger agreement: | 10, 849. |

⁵ Guardian’s policyholders likewise approved the merger at a vote on May 30, 2001. See Tr. at 99-100.

This constitutes an approval rate of 93.9 % of the total votes cast. See Kalib Certificate dated June 22, 2001.

III. DISCUSSION

A. BACKGROUND AND PURPOSE OF THE MERGER

Berkshire was formed in 1851 and has maintained its offices in Pittsfield, Massachusetts since that date. The company offers a range of life insurance, annuity benefits and disability income coverage. These products are marketed through brokers and Berkshire acts as a manufacturer of disability products through national accounts.

Berkshire's management believes that the merger will benefit Berkshire policyholders in three ways: policyholders will become members of a larger and financially stronger mutual insurance company; policyholders will receive a larger aggregate dividend in the years following the merger; and policyholders will continue to receive same services from Berkshire's policy servicing units as they do presently. The merger will also benefit Berkshire by increasing its potential for future growth and making Berkshire more competitive. See Tr. at 24-25.

Berkshire has a long business and cultural connection with its community and employees. In order to continue that connection, portions of Berkshire's existing business and certain of Guardian's business will be transferred to a wholly-owned subsidiary of Guardian's, Berkshire Life Insurance Company of America, a Massachusetts domiciled stock insurance company ("New Berkshire") which will retain Berkshire's office in Pittsfield, Massachusetts. By structuring the merger in this fashion, Berkshire's management believes that it will be able to retain Berkshire's identity,

corporate culture and business strength while benefiting from association with a stronger company. See Tr. at 25-26.

Berkshire's management considered a number of strategic alternatives, including, remaining independent, demutualizing and possible joint ventures with Guardian or other companies. Berkshire stated that its primary consideration in choosing this merger is its benefit for the policyholders. Berkshire's policyholders will become policyholders of Guardian, a larger and financial stronger mutual company. Policyholders will continue to be entitled to the benefits, values, guarantees and dividend rights of their existing insurance policies and annuity contracts and will continue to receive substantially the same services as are currently available. These policy servicing units will reside in New Berkshire.

Throughout early to mid-2000, the Berkshire board of directors met to consider the results of a due diligence review, the merger agreement and related transactions. See Tr. at 12-13. Based upon their own deliberations and the opinions of their retained financial advisors, Credit Suisse First Boston, and their retained actuarial advisors, Milliman, the Berkshire board of directors unanimously approved the merger agreement, plan of merger and related transactions on August 31, 2000. See Tr. 14 and 24-26 and certified copy of resolution of Berkshire board of directors approval at Docket Entry 8.3. The Guardian board of directors unanimously approved the merger agreement and related transactions on August 29, 2000. See certified copy of resolution of Guardian board of directors at Docket Entry 8.4. Following the Division's examination and continuing implementation planning, certain modifications were made to the original merger agreement and the Berkshire and Guardian boards of directors both unanimously

approved an Amended and Restated Agreement and Plan of Merger. See certified copy of resolution of Berkshire board of directors at Docket Entry 8.7; certified copy of resolution of Guardian board of directors at Docket Entry 8.8. Berkshire's board vote occurred on April 2, 2001. See certified copy of resolution of Berkshire board of directors at Docket Entry 8.7. The Guardian's board vote was held on February 28, 2001. See certified copy of resolution of Guardian board of directors at Docket Entry 8.8.

B. STRUCTURE OF THE MERGER

The merger agreement provides that Berkshire will merge with and into Guardian. Upon the consummation of the merger, the separate existence of Berkshire will cease and Guardian will be the surviving company continuing its corporate existence under the name The Guardian Life Insurance Company of America. The policyholders of Berkshire will become policyholders of the Guardian and will be entitled to rights and privileges in Guardian in accordance with the New York law, the charter and the by-laws of Guardian and the terms of their respective policies.

Guardian, as the surviving company, will remain domiciled in the State of New York and will retain the headquarters of Guardian (New York, New York) as its home office. Berkshire and Guardian have agreed that Guardian will continue to market a selected combination of insurance and financial products and services currently offered by both companies. All insurance policies issued by the Berkshire and Guardian and their subsidiaries or affiliates in-force at the effective time of the merger will continue in force in accordance with their terms and conditions, and will continue to be serviced by Guardian or New Berkshire subsequent to the merger.

C. INTERESTS OF POLICYHOLDERS

1. Contractual and Legal Rights

Although the management of Berkshire believes that the merger will not have a material adverse effect on the rights of the Berkshire policyholders, certain legal rights of Berkshire policyholders will change as a result of the merger. The rights of Berkshire policyholders are presently governed substantially by Massachusetts law and by Berkshire's charter and by-laws. Upon consummation of the Merger, Berkshire policyholders will become policyholders in Guardian and their rights (other than rights associated with their insurance coverage, which will remain unchanged) will be governed substantially by New York law and by Guardian's charter and by-laws.

(a) Contract Rights

The terms and provisions of the policies held by Berkshire policyholders will not change, and policy coverages and rights described in Berkshire policies will not be reduced or altered in any manner as a result of the merger. The premiums required to be paid as specified in these policies will not increase or otherwise change solely because of the merger, and Guardian will become fully obligated under the policies to the same extent as Berkshire is presently obligated.

(b) Voting Rights

The voting rights of Berkshire policyholders will change as a result of the merger. Currently, the Berkshire charter and Massachusetts law provide that each policyholder is entitled to one vote for each policy held subject to a maximum of 20 votes per person. Massachusetts law generally provides that policyholder action requires an affirmative vote of a majority of policyholders present and voting at a meeting. In order to approve a merger or consolidation, Massachusetts law also requires an affirmative vote

of two-thirds of policyholders present and voting at a special meeting called for that purpose.

Upon consummation of the merger, the voting rights of policyholders of the surviving company will be governed by the charter and by-laws of the surviving company, Guardian, and by New York insurance law. The charter of Guardian provides that each policyholder will be entitled to one vote per member, in person or by properly executed proxy, on all matters presented for a member vote; provided that where there is more than one insured under any policy, such insureds will be deemed to be a single policyholder for all purposes including voting rights. See Kalib Pre-Filed Testimony of at 2-4. In addition, New York law limits the right to vote in the election of directors to those policyholders whose policies have been in force for at least one year prior to such election. See Kalib Pre-Filed Testimony at 2-4. These changes in voting rights were reasonably disclosed to policyholders in the mailed proxy statement which included a section entitled “Policyholder Considerations Regarding the Merger - - Voting Rights of Berkshire Policyholders After the Merger” and a Chart comparing the pre-merger and post-merger voting rights. See Proxy Statement at Docket Entry 8.

2. Financial Strength and Complementary Nature of the Merged Company

Berkshire asserts that the merger will enhance the financial strength of each of the companies and will provide the surviving company with the financial strength, scale, and asset and product diversification required to compete successfully. See, e.g., Tr. at 11 and 29. The record indicates that the decision of the Berkshire board of directors to merge was the result of a careful study of various challenges which Berkshire was facing. See Tr. at 11 and 29. Specifically, Berkshire cited relatively high expense levels due to a

lack of scale and problems competing with companies with diversified and larger product lines as rationales for this particular merger. See Tr. at 11-12 and 29-30. Additionally, Berkshire cited the financial strength of Guardian, including its excellent capital resources and strong financial ratings. See Tr. at 24-25; 39-40; 75-76; 82-83.

Moreover, the complementary nature of the companies' businesses will serve the surviving company in good stead. Guardian is a financially strong player in whole life, group medical and dental and individual disability income insurance markets. See, e.g., Docket Entry 8. Berkshire's historical markets have included disability income, individual life, individual annuity and individual pension and group annuity deposit administration policies. See Tr. at 28. There appears to be considerable advantage to linkage of these product lines, particularly under the surviving company's excellent financial status. Additionally, it is asserted that this financial strength will allow for the use of more flexible strategies in managing the resultant investment portfolio. See Tr. at 45, 46 and 87.

3. Higher Dividend Expectations

The interests of Berkshire policyholders are furthered by the expectation that the aggregate amount of dividends payable by Guardian in the years following the merger to Berkshire individual life insurance policyholders who currently receive dividends will be greater than the aggregate amount that Berkshire would pay policyholders absent said merger. See Tr. at 25; 39; 51-52; 72. In fact, Guardian will apply established dividend principles in determining dividend payments to participating policyholders for years after the merger. See Post-Merger Individual Dividend Principles and Policy at Docket Entry 8.9.

a. Berkshire Individual Life Insurance Policyholders

Guardian has established a “Berkshire Segment” within Guardian’s general account. See Tr. at 47. After duly and reasonably accounting the assets, mortality tables and maintenance expenses in the segment, dividends for former Berkshire life insurance policies will be specifically protected for, at least, five years. See Tr. at 47-50; 103-104. Policyholders will be paid the greater dividend resultant from two possible calculations. See Tr. at 49. In short, the first approach will use the Berkshire dividend scale for the year 2001, except that the investment factor used will reflect the actual experience of the Berkshire segment. See Tr. at 49-50. The second possible approach will use the basic Guardian dividend scale structure as if Berkshire policies were originally issued by Guardian, with precise formulae for interest, mortality and expense components of the dividend scale. See Tr. at 50.

After five years, the Berkshire segment will merge into the Guardian business unless there is a material adverse effect therefrom on dividends to former Berkshire policyholders or other Guardian policyholders. See id. If so, the Berkshire policyholders will continue to be protected separately. See id. The materiality standard will continue to be applied annually for five additional years and will not be triggered unless the interest rate used to establish dividends for former Berkshire policyholders differs from that used to set dividends for other Guardian policyholders by ten (10) basis points (one-tenth of one percent) or less. See Tr. at 50-51; 105-106. Berkshire officials further estimate on average that, based on a variety of factors, a Berkshire individual life policyholder may expect an increase in dividend of 4% to 10% in 2002 over the dividend he or she otherwise would get if there was no merger. See Tr. at 52-53.

b. Former Berkshire Individual Disability Income Insurance Policyholders

Depending on the state, Berkshire disability income insurance policies formerly received dividends designated to offset a modified premium structure prior to 1997 when Berkshire discontinued such dividends. After the merger, dividends will be re-established on former Berkshire disability income insurance policies at the time that the former Berkshire disability income insurance block of business develops a sufficient experience fund to pay a dividend of at least 5% of premium for the succeeding three years. See Tr. at 53.⁶

c. Other Benefits to Former Berkshire Policies and Contracts

After the merger, there will be the same rate of interest on former Berkshire policyholder dividends on deposit as is credited to other Guardian policies. See Tr. at 54. Immediately after merging, this rate is expected to be as high or higher than that Berkshire would have credited absent the merger. See id. Similarly, the portfolio interest rate on flexible premium annuities will be comparable to those which would have been credited absent the merger. See id. Guardian, moreover, will continue the same method of investment generation analysis for the group pension side funds so that developing new money interest rates and portfolio rollover rates are expected to be commensurate with those Berkshire would have developed absent merging. See Tr. at 54-55.

The Chief Actuary for Guardian will recommend that dividends shall be paid to former Berkshire policyholders in the same manner that such recommendations are made for all other Guardian policyholders. See Tr. at 55. As long as the separate Berkshire

⁶ There will also be a gain or offset to this experience fund based on the difference between adjusted statutory profits and a presently estimated contribution to surplus of 8% of premiums.

segment is maintained, the Chief Actuary will annually provide the board of directors with a written opinion that the dividends for former Berkshire policyholders comply with the dividend principles. See Tr. at 55. Moreover, a duly qualified, nationally recognized outside actuary will annually provide an independent opinion on compliance with the dividend principles for that same period. See Tr. at 55-56.

4. Demutualization Protections for Former Berkshire Policyholders

The record of the public hearing indicates that it was somewhat precisely stated that “[a]t present, Guardian is not actively considering demutualization.” See Tr. at 56. Guardian’s President and Chief Executive Officer, Joseph D. Sargent, in fact, emphasized that “Guardian is committed to remaining a mutual life insurance company. Given The Guardian’s outstanding capital position, there is no need to demutualize as a source of capital.” Tr. at 61. He further stated that, “More importantly, [The Guardian] believe[s] being a mutual company gives us a powerful competitive advantage.” Id.

Notwithstanding this express commitment, the record demonstrates that there are reasonable protections for former Berkshire policyholders in the event of any future demutualization of the company. Section 8.13 of the merger agreement expressly provides that the former Berkshire policyholders must be treated fairly and equitably under any future plan of demutualization. See Docket Entry 8.5. See also Tr. at 56; 83-84.

D. POST-MERGER STABILITY

After the merger is complete, New Berkshire will continue to conduct some of its now-existing business. See Tr. at 34-35; 65-66. While some New Berkshire employees will manage current Guardian operations in other states and some current Berkshire employees will become Guardian employees, New Berkshire will maintain substantial ties to its historic Pittsfield, Massachusetts base. See Tr. at 101-102; 33-36. In fact, New Berkshire will retain its present headquarters in Pittsfield, Massachusetts and current management will manage New Berkshire and have day-to-day operational autonomy. See Tr. at 33-36. After merging, most of the Berkshire's current employees will become employees of New Berkshire and New Berkshire will assume policyholder service and administrative duties for the former Berkshire (now Guardian) policies. See Tr. at 25. The record indicates that Guardian plans on increasing the workforce in the Pittsfield, Massachusetts office. See Tr. at 67. While that office employed 370 individuals as of February 28, 2001, President and Chief Executive Officer Sargent specifically noted his expectation that the "future potential target workforce" for that office will be in excess of 500 employees since Guardian "has identified Pittsfield as a growth area of choice." Tr. at 67.

E. EXPERT EXAMINATION REPORTS AND OTHER MATTERS

The hearing transcript and docket of this proposed merger include duly noted professional reports from CSFB and Milliman in support of the transaction. See Docket Entry 8.11 (April 2, 2001 letter) and Tr. at 71-72; Docket Entry 8.12 (March 30, 2001 letter) and Tr. at 82-85. The record also includes the following expert examination reports from the Division's duly retained advisors which were filed

into the docket on May 3, 2001:

1. an actuarial fairness opinion from Tillinghast Towers Perrin;
2. a fairness opinion from Dresdner Kleinwort Wasserstein, Inc.;
3. a legal commentary on the plan of merger by Stroock & Stroock & Lavan, LLP; and
4. a financial due diligence examination report and a report on policyholder information package mailings and Berkshire voting procedures⁷ by KPMG, LLP. See Docket Entry 11. These examination reports (comprising 86 pages) further support approval of the proposed merger. See Docket Entry 11. There were no material findings made sufficient to warrant disapproval of the subject merger. See id. In fact, there was a complete absence of any testimony adverse to the proposed merger at the public hearing. See Tr. at 109-110.⁸

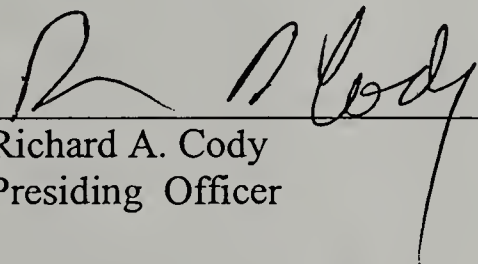
⁷ Additionally, an April 10, 2001 Ernst & Young audit report on the Berkshire proxy mailing process was received into the docket on June 6, 2001.

⁸ In an overabundance of caution, reference is made to six (6) letters which comprise the full amount of negative correspondence received on this matter. The hearing officers find it noteworthy that none of the corresponding parties indicated an interest in testifying at the public hearing as otherwise articulated in the hearing notice. The subject correspondence was directed from former Berkshire agents and others including William Magnusson, Clarke Langrall, Inc. (including one late-filed letter which, in our discretion, was still reviewed and considered although tardy), E.R. Anderson of Anderson, Kill, & Olick and the Center for Insurance Research. After due review, these letters do not provide any supportable basis for material findings and are wholly insufficient to warrant disapproval of the subject merger.


IV. ORDER

Based on all of the foregoing and the entire record of this proceeding, the proposed merger, including the merger agreement, meets the requirements set forth in M.G.L. c. 175, § 19B, as well as the requirements and standards of review set forth in 211 CMR § 140.00, *et seq.* The merger is in the public interest; the terms and conditions of the merger agreement are fair; and the interests of Berkshire policyholders are protected. Therefore, it is hereby ORDERED that the application of Berkshire Life Insurance Company to merge with and into The Guardian Life Insurance Company of America, pursuant to the merger agreement is hereby APPROVED.

Dated: June 25, 2001


Richard A. Cody
Presiding Officer

Dated: June 25, 2001


Michael T. Caljouw
Presiding Officer

